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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1128

JAMES HYMORE,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the Court of Appeals of Wood County, Ohio.

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RESPONDENT'S STATEMENT OF THE CASE.

James Hymore, respondent herein, was a full time factory guard and also was employed as a part time constable for Lake Township, Wood County, Ohio. Hymore had been appointed a constable on November 6, 1964, and the Township had furnished him with a uniform, badge, gunbelt and cap.

Hymore had a day off from his factory job on January 25, 1965, and he left his home and proceeded to the Wales Bar which is located in the Village of Northwood, Ross Township, Wood County, Ohio. He arrived at this bar about 7:15 P. M. Hymore did not have on his uniform, gunbelt, cap, nor was he using the official township marked car, and he was not summoned to the Wales Bar on official business. In fact, the bar was not located in Lake Township and therefore was outside his official baili-

wick. He stayed at the Wales from approximately 7:15 P. M. until approximately 11:00 P. M. During this time he had four (4) bottles of beer by his own testimony; however, Hazel Veler Johnson, one of the State's witnesses, stated that Hymore had four (4) or five (5) bottles of beer between 7:00 P. M. and 9:30 P. M., when she left the bar.

Hymore then left the Wales and went to the Web Bar which is located on East Broadway in Lake Township, also in Wood County, Ohio, and arrived there at 11:10 P. M. or 11:15 P. M. He was not summoned to the Web, nor was he on official business for the township according to his own testimony. He entered the bar by the rear door and had a bottle of beer, followed by another bottle of beer, then started drinking Seven Crown whiskey and soda. On direct examination, Hymore admitted to drinking six (6) drinks at the Web. The bar maid there, Mrs. Sendling, stated that on Hymore's arrival, he was under the influence, based on his appearance and actions. She served him "eight to ten" double Seagrams and sodas during his stay at the Web Bar. Hymore did not display his cap, holster, badge or gunbelt and no one could tell from his clothing that he was a constable. He wore a three-quarter length white jacket over dark trousers and no one knew that he was armed.

As the evening wore on, Hymore became quarrelsome and finally argued with several patrons about racing their automobiles and told them that he had a bullet that would outrun any of their cars. He also challenged several patrons to go outside and fight. Hymore then accused one of the patrons and the bar maid with gambling by making bets on the bowling machine scores, the machine being located near the West end of the bar. Several times from 12:00 midnight until 2:00 A. M., on January 26, 1965, Hymore threatened to arrest the bar maid, but following

his first threats of arrest, he bowled two games with the bar maid after she had bowled with the one patron, Lester William Kendall. Only the respondent and his witness, Earl Webb, testified that anyone had actually gambled. All other witnesses testified that no one had gambled and the bar maid had just made change for customers to play the machine. At approximately 2:00 A. M. Hymore walked from the West end of the bar, where he had been sitting, to the East end of the bar to the front door with his friend and witness, Earl Webb. He went outside with Webb to see if Webb's car would start. Hymore only came back in the bar to finish his drink. He returned to the West end of the bar and passed by the bar patrons who were sitting at the middle and East end of the bar. None of these patrons did anything to Hymore to cause him to believe he was in danger and wasn't afraid of them.

At 2:25 A. M. Hymore ordered his last whiskey and soda and proceeded to arrest Kendall for his alleged prior gambling by pushing Kendall up against some empty beer cases on the North wall of the bar, frisked Kendall for weapons and took Kendall's wallet. Kendall was forced to remain with his hands over his head and leaning against the empty beer cases. Kendall then asked two bar patrons to be witnesses in his behalf in a false arrest suit he proposed to bring against Hymore. Ron Shivak and Arthur Cadena came to Kendall, signed a slip of paper with their names and addresses and Kendall wrote the time on the slip of paper.

Hymore then threatened to arrest Shivak and attempted to prevent him from going to the restroom. Then Shivak and Cadena started to leave the bar, but Hymore asked to see Cadena's driver's license and Cadena refused. Hymore had no reason to believe Cadena was armed and had not seen Cadena commit *any* criminal act.

A scuffle developed between Hymore and Cadena and Hymore pulled out his .38 cal. revolver from a place concealed in his belt under his three-quarter length white jacket and shot Cadena in the head, killing him. Hymore, at the time was armed, with a blackjack but did not use it. Cadena had his hands at his side according to the closest witness. Hymore shot him from a distance of four to five feet.

Cadena was killed instantly by a single shot from Hymore's gun, the bullet striking him just under the left eye and traversing through the brain, the bullet lodging inside the skull, the bullet's flight being horizontal.

The Wood County Sheriff's office was notified and arrived nine minutes after the shooting. Deputy Sheriff Cloyce McGiffin arrived at the scene and was met at the door by Kendall who wanted to be placed in protective custody to protect him from Hymore. The deputy entered the bar where he met Hymore, a person known to him, and asked him what had happened. "I shot him" Hymore said. Hymore then told the Deputy Sheriff that he had placed two persons under arrest for gambling, after which the deceased came over to him. Hymore said that he told the deceased to leave and pushed him away, at which time the deceased came back and pushed Hymore into a steel post behind him. Hymore then said he thought the deceased came after him with a knife; that he pulled his gun, which discharged and struck the deceased in the face.

The investigation continued at the scene, after which the County Sheriff and the County Coroner arrived together. Respondent had not yet been arrested or placed in custody.

The County Coroner also talked with the Respondent while in a car with the Sheriff. The Respondent told the

Coroner virtually the same story that he told the Deputy Sheriff, and same went into evidence without objection. The record is not clear as to whether the Respondent was in custody at this point.

Respondent was charged with first degree manslaughter (Ohio Revised Code Section 2901.06), indicted and convicted by a jury.

The Court of Appeals for Wood County, Ohio, reversed the conviction, finding error in admitting the Coroner's testimony "of incriminating statements given by the Defendant to the Sheriff in the presence of the Coroner at the scene of the crime and on the trip from the scene of the crime to the Wood County Jail, and testimony of Deputy Sheriff McGiffin as to incriminating statements made by the Defendant at the scene of the crime without constitutional warning." The Court of Appeals cited *Jackson v. Denno,* 378 U. S. 368 and *Escobedo v. Illinois,* 378 U. S. 478, as its authority. The Court of Appeals also found error in admitting testimony of two females who were at the first bar visited by the Respondent because of remoteness.

The Ohio Supreme Court reversed the decision of the Court of Appeals (9 Ohio St. 2d 122) and remanded the case to the Court of Appeals for consideration of other errors not considered by the Court of Appeals. On remand the Court of Appeals found that the remaining claimed errors were not well taken and affirmed. The case was again appealed to the Ohio Supreme Court, which denied the motion for leave to appeal and dismissed the appeal. Thereafter the petition for certiorari was filed herein.

ARGUMENT.

Respondent feels that the only serious question raised by petitioner concerns statements made by him at the scene of the crime and shortly thereafter. However, it is respondent's position that the state court's decision herein on this question is fully "in accord with the applicable decisions of this court." Rule 19, Revised Rules, Supreme Court of the United States.

The testimony that is relevant to this question is as follows. A deputy sheriff named McGriffin arrived upon the scene of the shooting within minutes afterwards. One Kendall ran up to him asking to be put in protective custody. Thereupon McGiffin "walked on in and talked to Mr. Hymore (petitioner). Defendant asked him what went on and what happened, and he said, 'I shot him!' " Petitioner claims that the admission of this testimony constitutes prejudicial error. As stated by the Ohio Supreme Court, 9 Ohio St. 2d 122, "Nothing could be further from the mark."

First of all it was petitioner himself, a police officer, who summoned the sheriff. As pointed out by the Ohio Supreme Court, the deputy sheriff didn't even know what had taken place when he arrived. He was just beginning to investigate and merely inquired of a man he knew to be a police officer as to what had happened. Petitioner responded voluntarily but was not taken into custody until after several witnesses had been interviewed. It was not until *after* petitioner made his statement that the investigation began to center on him.

Before cataloguing the reasons why the Ohio Supreme Court was correct it should be pointed out that this case was tried in June of 1965. According to *Johnson v. New Jersey,* 384 U. S. 719, the *Miranda v. Arizona,* 384 U. S. 436 rule would not apply, as *Johnson* held that

Miranda applied only to trials which began after June 13, 1966. However, the case was tried after *Escobedo v. Illinois,* 378 U. S. 478.

For the following reasons, the statement made by petitioner to the deputy sheriff is admissible:

1. The petitioner was not in custody at the time the statement was made. Both *Escobedo v. Illinois, supra,* and *Jackson v. Denno, Warden,* 378 U. S. 368, were limited to in-custody interrogation. Again in the words of the Ohio Supreme Court herein:

> "In the instant case, the statement made came at the very outset of a general inquiry. No suspect existed and indeed there was no indication that a crime had even been committed."

2. Even if *Miranda* applied, which it does not, res gestae statements are not contemplated by *Miranda.* As stated by the Court of Criminal Appeals in Texas, *Hill v. State,* 420 S. W. 2d 408, the failure to advise a defendant of his right to remain silent and to appointment of counsel do not render inadmissible a statement made by a defendant at the time of his apprehension at the scene and which was made in response to a question not specifically calling for an admission or confession.

3. The statement herein was not prejudicial. There was never any question in this case that the petitioner shot the deceased, the whole case dealt with the circumstances surrounding the shooting and the manner in which the shooting took place. All of the remaining persons in the tavern knew who shot the decedent and so testified. Petitioner is trying to manufacture an issue on appeal, and so tried below, over a non-controverted matter.

4. The petitioner was a police officer giving information to a fellow peace officer. Petitioner has taken this

aspect of the case and tried to fit it within the purview of *Garrity v. New Jersey*, 385 U. S. 493, 87 S. Ct. 616, but *Garrity* is not applicable. In *Garrity* this Court held that a police officer could not be disciplined for claiming his fifth amendment right of silence. In passing the court stated, "We conclude policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." With this statement petitioner agrees, but points to the difference between the two cases. In *Garrity* the police officers were obliged to answer questions during an investigation or lose their jobs. In the case at bar there were no reasons to give any warnings. As the Ohio Supreme Court stated herein, "this Court is not disposed to require officers of the law to greet each other with warnings of constitutional safeguards whenever they meet at the scene of a disturbance unless adequate grounds for such precautions exist."

Petitioner also argues that the statement made to the Coroner is inadmissible. Early in his testimony the Coroner was asked of any conversation he might have had with petitioner. Objection was raised, because petitioner was not represented by counsel at the time, and apparently sustained. Thereafter a new area of inquiry was developed after which the prosecutor asked whether he had any conversations "with the defendant regarding the drinking of alcoholic beverages?"

"A. He stated how much he had drunk and—

Mr. McCullough: Object to that, same grounds as before.

The Court: Overruled.

Q. You may answer.

A. He stated he had had three whiskeys and three beers.

Q. Did you have any other conversations with the defendant?

A. I did.

Q. What did you say and what did he say?

A. I said very little. I did most of the listening. He stated that he had gotten off work; that he had gone to this bar to check on some gambling; that he had taken off his uniform coat and his gun holster and left them in the car; that he had put his gun underneath his belt and went into the bar. He stated that while in there that they were gambling with a type of machine, a bowling machine, where you slide these light weights across on the alley way of the machine and they were gambling about that. He thought that that was wrong and in the discussion over this and so forth, that he was going to arrest Mr. Cadena or was attempting to arrest him, to be more accurate, and he thought he was going to attack him or stab him or something and he whipped out his gun and shot him."

This conversation took place in a vehicle occupied by the petitioner, the Coroner and the County Sheriff (who did not testify) while the petitioner was being transported to the County Jail.

It is submitted that no error was committed in admitting this evidence, for the following reasons:

1. The statements were made prior to *Miranda* but after *Escobedo*. *Escobedo* dealt with a situation where the police refused to honor a defendant's request to consult with his attorney during the course of an interrogation. No such situation existed here.

2. The petitioner's remarks were virtually unsolicited and were not a part of any real interrogation.

3. There are no other indicia of involuntariness, such as existed in *Jackson v. Denno, Warden, supra*. As stated by the Ohio Supreme Court herein,

"At no time during the proceedings did the defendant contend that the statements attributed to him were

made involuntarily. In contrast to the contentions now made, the record undisputably supports the view that the conversation between the defendant and the coroner was in fact made voluntarily under conditions which did not create any feeling that defendant was compelled to speak on pain of suffering physical or psychological mistreatment. Nothing in the record suggests any threat or promise of leniency. The defendant was not suffering from bad health or mental derangement. There was no incommunicado detention and no interrogation. The circumstances of this case disclose that the defendant, a police officer himself, freely and voluntarily spoke to the coroner while being transported to jail. This is not even a case of a police officer fairly and noncoercively questioning a subject in order to fulfill his duty to ascertain the facts. (See *State v. Swiger*, 5 Ohio St. 2d 151, 160, certiorari denied, October 10, 1966.) Defendant's contention that this parallels *Jackson vs. Denno, Warden*, supra (378 U. S. 368), is simply not supportable. Jackson was interrogated by police while lying in a hospital bed suffering from two bullet wounds and under the influence of drugs. Defendant here simply volunteered a statement of facts to the coroner while enroute to jail. The absence of an interrogation coupled with the obvious voluntariness of defendant's remarks takes them out of the realm of inadmissible evidence."

4. The statements were not prejudicial to petitioner. They paralleled the position taken by him at trial and were in no way harmful to him at trial.

No new questions of law, not previously decided by this Court, are raised by either the statement to the deputy sheriff or the coroner. It seems clear that Ohio Supreme Court carefully considered petitioner's reasoning, but properly found it unconvincing. The doctrines previously announced by this Court were applied to the

facts at bar in a logical manner by the Ohio Supreme Court and no basis is found in the record for the granting of the petition for a writ of certiorari.

Questions 2, 3 and 4, set out at page 3 of petitioner's brief herein, do not concern federal matters. They relate solely to questions of substantial state criminal and procedural matters.

The following cases indicate that this Court will not involve itself where the cause relates to State law issues: *Henry v. Mississippi*, 379 U. S. 443, 85 S. Ct. 564, *Scripto v. Carson*, 362 U. S. 207, 80 S. Ct. 619, *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, 73 S. Ct. 143, *Hammerstein v. Superior Court of California*, 340 U. S. 622, 71 S. Ct. 521, *Hibbin v. Smith*, 191 U. S. 310, 24 S. Ct. 88.

CONCLUSION.

It is respectfully submitted that grounds do not exist for the grant of certiorari. Therefore, the petition should be denied.

Respectfully submitted,

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